

c. Later in November, Mr. Dyrek and a representative of Times Mirror personally discussed CableAmerica's interest in obtaining the ASPN programming for its Arizona subscribers. Id. at ¶ 13; Attachments 4 and 5 thereto.

d. On December 11, Mr. Dyrek again wrote to Times Mirror about acquiring the ASPN programming, and offered terms for CableAmerica's purchase of the programming. Id.; Attachment 4 thereto.

e. Also on December 11, a representative of Times Mirror wrote to Mr. Dyrek informing him that Times Mirror was analyzing the CableAmerica request for ASPN programming, and that Times Mirror would respond "in due course." Id.; Attachment 5 thereto.

f. On December 21, counsel for CableAmerica, David O. Stewart, telephoned counsel for Times Mirror to determine whether Times Mirror would sell the ASPN programming service to CableAmerica. See Declaration of David O. Stewart ("Stewart Decl.") at ¶¶ 2-3 (appended hereto as Exhibit B). Counsel for Times Mirror stated that Times Mirror was continuing to evaluate CableAmerica's request. Id. at ¶ 3. Mr. Stewart further stated that section 628 of the Act afforded only two limited grounds on which Times Mirror might refuse to sell ASPN programming to CableAmerica: (i) that Times Mirror had an exclusive contract to distribute ASPN programming to Dimension Cable that was

entered into on or before June 1, 1990, or (ii) that the exclusive contract with Dimension Cable could be shown to serve the public interest as defined in the statute. Id. Counsel for Times Mirror did not state whether Times Mirror had any such exclusive contract with Dimension Cable, whether any such contract was "grandfathered" under the Act, or whether it otherwise served the public interest. Id. at ¶ 5.

g. There have been no further communications between CableAmerica and Times Mirror regarding the sale of ASPN programming rights to Cable Arizona. See Dyrek Decl. at ¶ 13; Stewart Decl. at ¶ 6.

11. Because CableAmerica cannot offer the games carried by ASPN to its Arizona subscribers, and Dimension Cable can, CableAmerica is at a significant competitive disadvantage to Dimension Cable in the Mesa market. Id. at ¶ 11.²

(a) Many potential subscribers to the CableAmerica system in Mesa have chosen not to do so because CableAmerica cannot provide them with ASPN programming, particularly the ASPN's exclusive cablecasts of the Phoenix Suns basketball games. Id. For example, over the last two months CableAmerica has

² The allegations in Paragraph 11, and in Paragraphs 16-19, are not strictly required in a proceeding commenced under § 628(c)(2)(B) or (D) of the Act. Yet they do bear on the considerations involved in a § 628(b) proceeding, they do provide useful background information on the anticompetitive practices at issue in this complaint, and they do relate to the issue of damages which CableAmerica has requested.

expanded into the Dobson Ranch subdivision in Mesa. Of the 37 potential subscribers in the Dobson Ranch subdivision who declined to subscribe to CableAmerica, fifteen (or 40 percent) stated specifically that their decision was based on CableAmerica's inability to provide ASPN. Id.

(b) Numerous CableAmerica subscribers have requested that the CableAmerica systems carry the ASPN programming, so that they may view the Phoenix Suns games carried by the programming service. Id.

12. Under section 628(b) of the Act, a vertically integrated cable programming vendor may not engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent a cable operator from providing satellite cable programming. Section 628(c)(2)(B) specifically prohibits discrimination by a vertically integrated cable programming vendor between or among cable operators. Section 628(c)(2)(D) specifically prohibits an exclusive contract for satellite cable programming between a cable operator and a vertically integrated cable programming vendor unless the Commission finds that the exclusive contract is in the public interest.

13. Section 628(h) of the Act further provides that an exclusive contract is not unlawful if was entered into on or before June 1, 1990.

14. Times Mirror and Dimension Cable have an exclusive contract for ASPN programming in Mesa. The existence of this

contract is confirmed by Times Mirror's refusal to sell to CableAmerica the same ASPN programming service that it provides to Dimension Cable.

15. Times Mirror has not asserted that its exclusive contract with Dimension Cable for ASPN programming was entered into on or before June 1, 1990, or that it is in the public interest. See Stewart Decl. at ¶ 5.

16. Times Mirror's exclusive programming contract with Dimension Cable for the ASPN programming service has the purpose and effect of preventing CableAmerica from providing ASPN programming to its Mesa subscribers. Dyrek Decl. at ¶ 10.

17. CableAmerica's inability to provide that programming to its subscribers makes the CableAmerica service less valuable to Mesa residents. See Dyrek Decl. at ¶¶ 11, 14. The Phoenix Suns' basketball season is now roughly half over, and CableAmerica in Mesa suffers further competitive injury with every game that is carried exclusively on Dimension Cable. Id. There have been nine such exclusively cablecast games so far this season, and there are eleven more through April 19. Id. at ¶ 7. ASPN's exclusive contract extends through the Suns' 1993-94 season, as well. See id. at Attachment 1.

18. Due to Times Mirror's refusal to deal with CableAmerica in Mesa, CableAmerica is placed at a significant competitive disadvantage to Times Mirror's affiliate, Dimension Cable, in that community. Id. at ¶¶ 11, 14.³ Times Mirror's refusal to

³ Nor is there any reasonable programming substitute for subscribers who want to watch the Phoenix Suns games as they are being played. It may fairly be presumed that a CableAmerica

sell the ASPN service to CableAmerica also means that the ASPN programming is available to fewer residents of Mesa because at least some of that programming is not available through any other media outlet. See id. at Attachment 1.

19. By guaranteeing Dimension Cable exclusive access to the Phoenix Suns games telecast on ASPN, and to all ASPN programming generally, Times Mirror has illegally and unfairly commandeered a preferred competitive position in the Mesa cable television market, to the disadvantage of CableAmerica and its subscribers. See Dyrek Decl. at ¶¶ 11, 14.

20. Times Mirror's exclusive programming contract with Dimension Cable for ASPN programming is not in the public interest. As discussed above:

(a) ASPN programming appeals to many subscribers and potential subscribers to cable television in Mesa. In order to compete effectively with Dimension Cable there, CableAmerica needs to offer the ASPN service in its programming line-up. If CableAmerica cannot offer this programming to subscribers, its penetration level in Mesa will be lower, its ability to operate efficiently will be reduced, its operating capital and access to financing will be lowered, and its ability to compete in that market will be hindered significantly.

(b) For the same reasons, the exclusive contract for ASPN programming can only discourage the

subscriber who is a Phoenix Suns fan will not be content to watch videotape of a professional bowling match instead of a live Phoenix Suns game. See Dyrek Decl. at ¶ 11.

development of alternative multichannel video programming distribution technologies in the Mesa area.

(c) Nor are exclusive contracts to cablecast professional sporting events necessary to encourage the investment of capital to produce and distribute new satellite cable programming. Such events are ongoing and will continue regardless of how the issues raised in this complaint are resolved, and their popularity confirms that there will always be an incentive to distribute live cablecasts of such events. The proliferation of regional sports programming networks for cable television systems confirms the powerful appeal of this programming.

(d) Diversity of programming in the Mesa multichannel video programming distribution market is reduced by such contracts because fewer Mesa residents have access to cablecasts of ASPN programming.

(e) Exclusive contracts such as the one at issue here, even if limited to short durations, are not in the public interest. For sporting events in particular, a contract that lasts just the length of one season has the potential to reduce subscriber levels significantly, and to limit competition and the programming diversity available to affected residents.

21. The exclusive contract between Times Mirror and Dimension Cable is unlawful and violative of section 628 of the Act, and CableAmerica is entitled to relief therefrom.

WHEREFORE, CableAmerica asks for the following relief:

1. That the Commission declare the exclusive programming contract between Times Mirror and Dimension Cable to be unlawful under section 628 of the Act,
2. That the Commission void that contract under authority of the Act,
3. That the Commission establish reasonable prices, terms, and conditions for providing the ASPN programming service to CableAmerica,
4. That the Commission award CableAmerica damages for the loss of revenue suffered as a result of Times Mirror's unlawful refusal to sell CableAmerica the ASPN programming service, and
5. That the Commission award CableAmerica its reasonable attorneys fees and costs incurred in connection with the prosecution of this action, and such other and further relief that the Commission deems just and appropriate.

Respectfully submitted,

David O. Stewart TBS

David Overlock Stewart
Thomas B. Smith
ROPES & GRAY
1001 Pennsylvania Avenue, N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

Counsel to Complainant
CableAmerica Corporation

January 25, 1993

01319.CA

EXHIBIT 1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of

CABLEAMERICA CORPORATION,

Complainant,

v.

TIMES MIRROR CABLE TELEVISION,

Defendant.

File No.

DECLARATION OF CHRISTOPHER A. DYREK

Christopher A. Dyrek, of Phoenix, Arizona, makes the following declaration:

1. I am currently the vice president of CableAmerica Corporation ("CableAmerica"). CableAmerica's business address is 4250 E. Camelback Road, Suite 160-K, Phoenix, Arizona 85018; telephone number (602) 952-0471.
2. CableAmerica Corporation is a multichannel video programming distributor that owns and operates cable television systems in several United States markets. CableAmerica provides cable programming to approximately 54,000 subscribers nationwide.
3. Some of the CableAmerica systems operate in direct competition with other cable television systems, as in, for

example, Huntsville, Alabama. To the best of my knowledge, CableAmerica is one of the few cable companies willing to compete head-to-head with other cable companies today.

4. Since 1988, CableAmerica has operated a cable television system in Mesa, Arizona, with 8,047 subscribers. In this market, CableAmerica competes directly with another cable operator serving the same area, Dimension Cable.

5. To the best of my knowledge, Dimension Cable is owned, in whole or in significant part, by Times Mirror Cable Television ("Times Mirror"). Dimension Cable operates in the Phoenix area (including Mesa) the fifth largest cable system in the country, with approximately 375,000 subscribers. Dimension Cable reports having approximately 40,000 to 50,000 subscribers in Mesa. Id.

6. Times Mirror owns the Arizona Sports Programming Network ("ASPN"), which provides sports programming to cable systems and other video programming distributors. ASPN carries live video transmissions of various sporting events featuring teams based in Arizona or otherwise of interest to Arizona residents.

7. The sporting events carried by ASPN include twenty professional basketball games played by the Phoenix Suns during the 1992-1993 National Basketball Association season. The twenty games carried by ASPN are not available through over-the-air television broadcasts, or through any cable programming vendor other than Times Mirror's ASPN. See Attachment 1 hereto. ASPN already has broadcast nine of the Suns' games for which ASPN has

exclusive rights. Eleven such games remain for this season, through April of this year.

8. Thirty other Phoenix Suns games scheduled during the 1992-1993 NBA season are broadcast by a local Phoenix television station, and CableAmerica in Mesa carries that station in its programming line-up.

9. Live telecasts of professional basketball games featuring the Phoenix Suns are among the most popular forms of video programming in the metropolitan Phoenix area (which includes Mesa). See Attachment 1 hereto. The Phoenix Suns games that are broadcast and cablecast routinely receive high viewership ratings. Id.

10. Times Mirror has made its ASPN programming service available to Times Mirror's Dimension Cable system in Mesa, and thus Times Mirror subscribers may view the twenty Phoenix Suns games that are carried by that programming service. Times Mirror also sells ASPN programming to TCI of Scottsdale, the cable television system in Scottsdale, Arizona, which is part of the Phoenix metropolitan area. Yet Times Mirror has refused to sell the ASPN programming service to CableAmerica, so CableAmerica subscribers cannot view these games.

11. Because CableAmerica cannot offer the games carried by ASPN to its Arizona subscribers, and Dimension Cable can, CableAmerica is at a significant competitive disadvantage to Dimension Cable in the Mesa market. In fact, our experience is that

(a) Many potential subscribers to the CableAmerica system in Mesa have chosen not to subscribe because CableAmerica cannot provide them with ASPN programming, and particularly with cablecasts of the Phoenix Suns basketball games available on ASPN. For example, over the last two months CableAmerica has expanded into the Dobson Ranch subdivision in Mesa, which also is served by Dimension Cable. Of the 37 potential subscribers in the Dobson Ranch subdivision who declined to subscribe to CableAmerica, fifteen (or 40 percent) stated specifically that their decision was based on CableAmerica's inability to provide ASPN.

(b) Numerous CableAmerica subscribers have requested, and continue to request, that the CableAmerica systems carry the ASPN programming, so that they may view the Phoenix Suns games carried by that service.

12. CableAmerica has repeatedly requested that Times Mirror sell the ASPN programming service to CableAmerica for distribution to CableAmerica's Mesa subscribers. I first raised this issue with Times Mirror in a letter dated October 8, 1992. See Attachment 2 hereto. Times Mirror did not substantively respond to my inquiry, so on November 5, 1992 , I again asked to buy the ASPN programming for CableAmerica. See Attachment 3 hereto. I even cited section 628 of the Act in this letter. Id.

13. Still I received no response from Times Mirror. So, in late November, I personally discussed CableAmerica's interest in obtaining the ASPN programming with Kent Franke, the senior vice president for programming at Times Mirror. See Attachments 4 and 5 hereto. I submitted a further, more formal offer for the ASPN service in a letter dated December 11, 1992. See attachment 4 hereto. By letter also dated December 11, Mr. Franke informed me that Times Mirror was analyzing my request, and that he would "get back to me in due course." See Attachment 5 hereto. Since that time I have heard nothing from Mr. Franke or anyone else at Times Mirror about ASPN.

14. CableAmerica's inability to provide the ASPN programming service to its subscribers makes the CableAmerica service less valuable to Mesa residents. In order to compete effectively with Dimension Cable there, CableAmerica needs to offer ASPN in its programming line-up. As long as CableAmerica is precluded from offering ASPN to its subscribers, its penetration level in Mesa will be lower, its ability to operate efficiently and profitably will be impaired, its access to financing will be reduced, and its ability to compete in that market will be hindered significantly.

Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on January 21, 1993.


Christopher A. Dyrek

Attachment 1



BOB CONN

The Arizona Republic

TV ratings prove Valley is Suns crazy

Television ratings offer further evidence of the growing obsession with the Suns in the Valley, and the increasing national interest in the team.

Tuesday night's game between the Suns and the Houston Rockets on Channel 45 was the highest-rated regular-season game seen here on local TV in recent memory, perhaps ever. The 19.8 rating blew away anything previous on Channel 45. No local regular-season game on Channel 45 had produced a rating as high as 18. The game also had a 27 share.

Ratings indicate the percentage of all households with TV sets, and the share is the percentage of households watching TV.

The only higher-rated program overall in the Phoenix area for the evening was ABC's *Roseanne*, a perennial national ratings leader. But that was only for a half-hour, compared with the two-plus hours of the Suns game. The Suns had a higher rating than *Roseanne* in head-to-head competition in the 8-8:30 p.m. time slot.

During the game's last 15 minutes, it had a 25 rating and a 33 share, meaning that one in three homes in which people were watching TV was tuned to the Suns.

The 11 games shown so far on Channel 45 have produced a combined rating of 14.7 with a 23 share. Last year, the Suns had a 9.9 rating for all games with a 17 share. It was roughly that two years ago, and three years ago, the numbers were 7.5 and 12.

Meanwhile, Sunday night's Suns-San Antonio game was tied for the fourth highest-rated game, out of 17, on the TNT cable network this season. The 2.1 national rating doesn't sound like much, but it's cable, remember. It was 17 percent higher than the average NBA rating on TNT.

With all home games sold out, some fans are complaining the Suns aren't on enough. Channel 45 shows 30 games (25 road, five home), and ASPN/Prime Ticket shows an additional 20 (15 road, five home) on cable. The contracts with each expires after next season, and then look for changes.

Suns President Jerry Colangelo said more games on Channel 45 might be added next year. But he said his ultimate goal is to have all 41 road games on over-the-air, non-cable television.

Home games, though, are another story. "First and foremost, (the goal) is having your seats sold," Colangelo said. "We happen to be in a situation where we have our seats sold, but it's important to maintain control."

In the future, Colangelo said he prefers over-the-air telecasts for road games and cable for home games. Cable options includes basic cable, some form of pay-per-view, or a combination.

"Pay cable for sporting events is the future," Colangelo said.

And with home games sold out, "Pay television is a means of expanding the capacity of your facility," Colangelo said.

But don't panic. Colangelo said he always has been committed to free, over-the-air television, and will continue to be. For road games.

"Televising games is a form of revenue, a form of advertising," he said. "Those 41 games we're talking about, that's what it's all about."

Colangelo said he has wanted to start negotiations with Dimension Cable to discuss extending the current contract, but has heard nothing.

Rare appearances

Thanks to the late addition of the game against the Orlando Magic on Feb. 7, NBC now has the grand total of two guaranteed Suns appearances. The other will be a game at San Antonio on April 24. Three other telecasts are tentative.

Compare that with the Chicago Bulls, who will be on at least seven times, and the Boston Celtics, who will make five certain appearances. Other teams with more guaranteed appearances than the Suns are the New York Knicks and Spurs (four each), and the Portland Trail Blazers and Golden State Warriors (three each). The Los Angeles Lakers, Cleveland Cavaliers and Magic are on twice each.

Then again, it could be worse. The Seattle SuperSonics, a pretty fair team, have no guaranteed dates.

The Bulls we can understand. But the Celtics? Sure, the Celtics have a lot of Sunday afternoon games, anyway, but what good is that, or their tradition, if they're a bore to watch.

The NBA basically picks the games NBC will show.

"I guess in June we didn't know the Suns would have the best record on January 1," said Matt Winick, the NBA director of scheduling and game operations.

Winick said the TV schedule "was pretty well put in place" before the Suns acquired Charles Barkley.

But he said not to discount the tentative dates.

"We thought enough of Phoenix to put them into positions that, if their fortunes turned, they would get more exposure," he said.

Attachment 2

CableAmerica Corp.

4250 East Camelback Road • Suite 160H • Phoenix, Arizona 85018-8394 • (602) 952-0471 • FAX (602) 952-0458

VIA REGISTERED MAIL

FILE COPY

October 8, 1992

Mr. Kent Franke
Times Mirror
2381-2391 Morris Avenue
Irvine, California 92714-6233

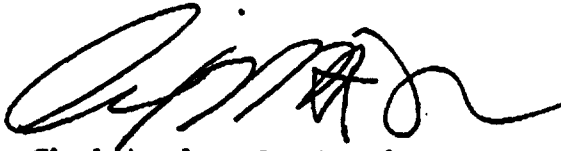
Dear Mr. Franke:

CableAmerica currently operates cable television systems in Arizona. In order to better serve our subscribers, we wish to procure the same Arizona Sports Program Network (ASPN) service offered to subscribers in the Phoenix area through Dimension Cable and in Scottsdale through TCI Cable of Scottsdale.

We are interested in obtaining this service in a manner similar to TCI of Scottsdale. Please forward the appropriate data I would need to evaluate this channel selection.

As we would be interested in launching ASPN before December 31, 1992, we appreciate your prompt attention to this matter.

Regards,



Christopher A. Dyrek
Vice President

cc: William G. Jackson, President
Joe Reifer, Cole Raywid & Braverman

Attachment 3

CableAmerica Corp.

4250 East Camelback Road • Suite 160H • Phoenix, Arizona 85018-8394 • (602) 952-0471 • FAX (602) 952-0458

November 5, 1992

Mr. Kent Franke
Times Mirror Cable TV
2381 Morris Ave.
Irvine, CA 92714-6233

Dear Mr. Franke:

This letter is a followup to my letter to you dated 10/8/92, copy attached.

It has been about a month since this was sent and we have not yet had a response from you or Times Mirror Cable TV concerning this request for carriage of Arizona Sports Programming Network on some of our Arizona cable tv systems.

This request is being made pursuant to the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 547 Section 628 Development of Competition and Diversity in Video Programming Distribution and 47 U.S.C. 533 Section 616 Regulation of Carriage Agreements.

Please favor us with your prompt response to these communications.

Sincerely,



Christopher A. Dyrek
Vice President
CableAmerica Corp.

cc: W. G. Jackson
Larry W. Wangberg
J. R. Reifer

CAD/m

Attachment 4

CableAmerica Corp.

4250 East Camelback Road • Suite 160K • Phoenix, Arizona 85018-8394 • (602) 952-0471 • FAX (602) 952-0438

VIA UPS OVERNIGHT

December 11, 1992

Mr. Kent Franke
Senior Vice President Programming
Times Mirror Cable Television
2381-91 Morris Avenue
Irvine, California 92714-6233

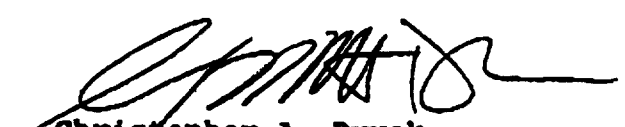
Dear Kent:

As a follow up to our meeting regarding ASPN last week at the Western Show, I would like to make a more specific offer that time constraints and circumstances did not allow.

CableAmerica is willing to enter into an agreement to pay twenty five (\$.25) cents per subscriber per month for the ASPN service. We currently have approximately 9,000 subscribers that would take the service. CableAmerica will cover all costs of establishing the service to our headend.

Kent, thank you for your prompt attention to this project. Please contact me in order to move this process to the next logical step.

Regards,



Christopher A. Dyrek
Vice President

cc: William G. Jackson, President
Larry W. Wangberg
Joe Reifer, Cole Raywid & Braverman

Attachment 5



Mailing Address
P.O. Box 18398
Irvine, CA 92713-9398

Times Mirror
Cable Television
2381-91 Morse Ave.
Irvine, CA 92714-6233
714 680-0500

December 11, 1992

Keat D. Franks
Senior Vice President
Programming

Mr. Christopher A. Dyrek
CableAmerica Corp.
4250 East Camelback Road
Suite 160K
Phoenix, AZ 85018-8394

Dear Mr. Dyrek:

This letter is a follow-up to your November 5, 1992 letter, and subsequent inquiry at the Western Show. I apologize for not responding to your letter sooner. I had assumed that it crossed in the mail with my November 2nd letter acknowledging receipt of your initial inquiry regarding ASPN.

We are analyzing your request for carriage of ASPN in light of the 1992 Cable Act, as cited in your November 5th letter. As you know, the provisions you cite are the subject of extensive FCC rulemaking, and recent litigation filed challenging those very provisions. Because of the ambiguities of the new law, and the pending constitutional challenges, we are unable to conclude our analysis at this time, as I am sure you can appreciate.

Again, thank you for your interest in ASPN. And, let me assure you that we plan to get back to you in due course.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Keat D. Franks'.

EXHIBIT 2

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter Of

CABLEAMERICA CORPORATION,

Complainant,

v.

TIMES MIRROR CABLE TELEVISION,

Defendant.

File No.

DECLARATION OF DAVID O. STEWART

David O. Stewart, of Washington, D.C., makes the following declaration:

1. I am an attorney in private practice and a partner in the law firm Ropes & Gray in Washington, D.C. I represent CableAmerica in connection with the matter that is the subject of the complaint in this proceeding, as well as on other matters. My office address is 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004; telephone number (202) 626-3900.

2. On December 21, 1992, I telephoned Ms. Goller, general counsel for Times Mirror Cable Television ("Times Mirror"), to determine whether Times Mirror would sell the ASPN programming to CableAmerica. I was referred to Rose Perez, an attorney in the general counsel's office.